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No. 08-1021

FILED
MAR 16 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

GILEAD SCIENCES, INC., et al.,

Petitioners,

v.

TRENT ST. CLARE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the state

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for any party has authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of the intent to file this brief at least 10 days prior to the filing of this brief, and both parties gave consent to the filing of *amicus* briefs.

and federal courts, legislatures, and executive branches. To that end, the Chamber files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The issue of how loss causation must be pled in securities class actions is one of recurring importance to the publicly traded member companies of the NAM and the Chamber. The element of loss causation serves a central gate-keeping role by requiring securities fraud plaintiffs to plead and prove that any alleged loss resulting from a stock price drop was the result of fraud and not the product of numerous other factors that can impact a company's stock price. Meaningful enforcement of the loss causation requirement at the pleading stage reduces the likelihood that companies will be drawn into costly securities class actions by plaintiffs armed with nothing more than a stock price drop and a fanciful theory manufactured after the fact.

The standard for pleading loss causation takes on particular importance during difficult economic times such as these, where the vast majority of public companies have experienced falling stock prices due to macroeconomic conditions. While common sense would dictate that such losses should not expose issuers to claims of securities fraud, a weak pleading standard for loss causation – the element best suited to weed out such suits – opens the door to precisely such litigation. Thus, the NAM and the Chamber are concerned that the thousands of public companies in their respective constituencies could face expanded

exposure to opportunistic strike suits, "[t]he very pendency of [which] may frustrate or delay normal business activity." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006).

INTRODUCTION

The Court should grant the petition for writ of certiorari filed by Gilead Sciences, Inc. ("Gilead") and various of its current and former executive officers. The Ninth Circuit has articulated a standard for pleading loss causation which not only empties the requirement of its potency, but conflicts with every other Circuit that has ruled on the issue, and this Court's recent decision in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). The Court therefore should grant the petition to resolve the conflict and create a consistent and sensible standard for the pleading of loss causation in securities fraud actions.

REASONS FOR GRANTING THE PETITION

In *Dura Pharmaceuticals v. Broudo,* 544 U.S. 336 (2005), this Court reaffirmed the critical importance of the loss causation requirement in securities fraud cases, ruling that such actions cannot proceed unless the operative complaint demonstrates that alleged losses were caused by defendants' misrepresentations, and not by any of the other "tangle of factors" that can cause a decline in a company's stock price.

Id. The Court also mandated that plaintiffs plead facts that would allow a fact finder to disentangle the impact of the alleged fraud from other market factors such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of [a stock's] lower price." *Id.* at 343. The *Dura* opinion emphasized that a failure to vigorously enforce the loss causation requirement would effectively "transform a private securities action into a partial down-side insurance policy." *Id.* at 348.

In this action, respondents allege they were damaged by a drop in Gilead's stock price on October 28, 2003, after an unfavorable earnings release was issued by the company. Respondents' theory, however, of how that stock price drop was the product of fraud was rightfully dismissed by the district court as "too attenuated," and lacking in factual support. Specifically, respondents alleged that Gilead was secretively engaged in impermissible "off label" marketing of the drug Viread, which supposedly resulted in artificially inflated sales of the product. When the Food and Drug Administration ("FDA") sent Gilead a letter on July 29, 2003 warning it against the use of such marketing, respondents allege that doctors reacted by scaling back prescriptions of Viread, causing sales to decrease and leading to a drop in Gilead's stock price three months later.

The district court correctly rejected respondents' speculative theory because it was premised on assertions that were unsupported by well-pled facts. No facts were set forth substantiating that the FDA letter led to a decrease in doctor prescriptions of Viread – to the contrary, analyst reports cited in the complaint actually predicted an *increase* in demand. Nor were respondents able to explain how an announcement made in August of 2003 could cause a stock price drop *three months later*, especially given that the complaint itself alleged that the stock traded in an open and efficient market. Similarly, the complaint provided no basis for the court to make the determination – as required by *Dura* – of what portion of the stock price drop was the result of misconduct, if any, and what was attributable to other intervening market factors.

In reviewing the lower court decision, the Ninth Circuit acknowledged the importance of the loss causation requirement, but nonetheless ruled that because respondents' theory of loss causation was not "per se implausible," the threshold for pleading loss causation had been met. The lack of specific facts supporting respondents' arguments did not deter the Ninth Circuit from breaking with its sister Circuits and overruling the district court's decision, and in so doing establishing a wholly inadequate standard for the pleading of loss causation.

I. THE NINTH CIRCUIT'S RULING WILL RENDER COMPANIES MORE SUSCEPTIBLE TO STRIKE SUITS, ESPECIALLY IN DIFFICULT ECONOMIC CONDITIONS.

The Ninth Circuit has articulated a standard for pleading loss causation that is trivially easy to satisfy – all that is required is a stock price drop and a modicum of imagination. The ruling effectively obviates the gate-keeping function of the loss causation requirement, and will have particularly pernicious effects on American businesses in a down economy where significant declines in company stock prices are commonplace. Indeed, the facts of the *Gilead* case serve as a template by which an opportunistic shareholder can skirt the loss causation requirement in securities class actions.

Under the Ninth Circuit standard, loss causation can be pled by simply pointing to: 1) an unfavorable earnings release followed by a drop in the company's stock price – an occurrence which, in today's market conditions, is a common if not ubiquitous event; and 2) a "not per se implausible" theory connecting the unfavorable earnings to negative news about the company in the past.

A plaintiff is *not* required, however, to provide specific facts supporting a purported theory of how a stock price drop was caused by fraud, notwithstanding Rule 9(b)'s requirement to plead the elements of fraud with particularity. In this case, the Ninth Circuit allowed respondents to simply state various

conclusions without offering any corroborating details, *e.g.*, that the FDA letter caused doctors to cut back on Viread prescriptions, without pleading a shred of supporting facts. Freeing plaintiffs of any obligation to provide factual substantiation of their loss causation theory threatens an increase in a practice that Congress has decried, *i.e.*, the "filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer." H.R. Conf. Rep. No. 104-369, at 28 (1995).

Nor need a plaintiff show any temporal proximity between the revelation of the alleged fraud and the stock price drop that it purportedly caused. In this instance, the Ninth Circuit paid no heed to the fact that it took three months before the market allegedly reacted to a disclosure that Gilead was engaged in fraudulent marketing activity, and downplayed the inherent implausibility of such a sluggish reaction in an efficient market. It thus becomes unclear what, if any, limits there are to the ability of a plaintiff to reach backwards in time for a *post hoc* explanation of how a stock price drop was caused by "fraud," vastly expanding the universe of speculative theories that can be generated to satisfy the loss causation requirement.

In the same vein, it is not necessary under the Ninth Circuit standard to demonstrate how alleged losses from a stock price drop were caused by fraud and not any other market factor. The October 28

earnings announcement that preceded the stock drop at issue disclosed a variety of issues that contributed to Gilead's disappointing earnings. Notably, off-label marketing was not mentioned. Each of the factors which were discussed, however, arguably contributed to the fall in the company's stock price at issue. Contrary to the dictates of *Dura*, neither the respondents nor the Ninth Circuit made any effort to explain why the stock price drop could not have been the result of these or other non-fraudulent events. This omission takes on particular importance in a down stock market, where a host of macroeconomic and other factors contribute to falling prices, all of which can be ignored by a plaintiff under the Ninth Circuit's analysis of loss causation.

Equally troubling is the Ninth's Circuit's attempt to downplay the speculative nature of respondents' loss causation theory by asserting that its validity can be tested through the discovery process. This is precisely what *Dura* sought to avoid in requiring that the loss causation requirement be strictly enforced, noting it guards against "'the routine filing of lawsuits . . . with only a faint hope that the discovery process might lead eventually to some plausible cause of action.'" *Dura*, 544 U.S. at 347 (citation omitted); *see also Tellabs v. Makor*, 551 U.S. 308 (2007) ("[p]rivate securities fraud actions . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law"). Indeed, the threat of costly discovery abuse was a significant

motivating factor in Congress's enactment of the Private Securities Litigation Reform Act of 1995, which stayed all discovery in securities fraud actions until a plaintiff's complaint survived a motion to dismiss. 15 U.S.C. § 77z-1(b)(1); § 78u-4(b)(3)(B). Allowing courts to apply only minimal scrutiny to the loss causation requirement until completion of discovery would undermine this critical safeguard.

Moreover, while it is true that loss causation theories based on idle speculation can be ultimately disproven as the evidentiary record emerges, that fact is of scant comfort to companies that inevitably will be sued. As this Court has recognized, "[e]ven weak cases brought under [the securities laws] may have substantial settlement value . . . because '[t]he very pendency of the lawsuit may frustrate or delay normal business activity.'" *Merrill Lynch,* 547 U.S. at 80 (2006), *citing Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Indeed, the fundamental premise of *Dura* was that enforcement of the loss causation requirement *at the pleading stage* serves a vital role in ensuring that "largely groundless claim[s]" are not allowed to proceed. *Dura*, 544 U.S. at 347.

In sum, the Ninth Circuit's ruling threatens the vitality of the critical loss causation principles articulated in *Dura*, and re-opens the door to abuses that Congress has specifically attempted to eliminate. The Court should grant the Petition in order to correct this misguided standard.

II. THE NINTH CIRCUIT'S RULING CREATES A SPLIT BETWEEN THE CIRCUITS ON THE CRITICAL ISSUE OF LOSS CAUSATION AND IS INCONSISTENT WITH THIS COURT'S DECISION IN *TWOMBLY*.

A. The Ninth Circuit's Ruling Directly Conflicts With Other Circuits That Require Loss Causation To Be Pled With Factual Specificity.

As detailed in the Petition, each of the five other Circuits that have ruled on how loss causation must be pled have concluded that the particularity requirements of Rule 9(b) apply, or at a minimum demand some amount of factual specificity to be pled in support of a loss causation theory. *See e.g., Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 842-43 (7th Cir. 2007); *Catogas v. Cyberonics, Inc.*, 292 F. App'x 311, 312-14 (5th Cir. 2008) (per curiam); *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007); *Teachers' Ret. Sys. v. Hunter*, 477 F.3d 162, 186 (4th Cir. 2007); *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir.) (quotation omitted), *cert. denied*, 129 S. Ct. 222 (2008).

The Ninth Circuit stands alone in its interpretation of the loss causation pleading requirement. This conflict between the Circuits not only raises the threat of inconsistent rulings, it also creates significant motivation for forum shopping. Over the course of the last decade the Ninth Circuit has consistently ranked as either the first or second most active

Circuit in the country for securities class action filings. *See, e.g.*, Cornerstone Research, *Securities Class Action Filings, 2008: A Year in Review* (2009) at 21, available at http://www.cornerstone.com/pdf/practice_securities/2008Filings_Report.pdf. Now that this historical hotbed of securities litigation activity has adopted the nation's most permissive standard for loss causation pleading, plaintiffs will have incentive to seek litigation of their actions in that forum, and the number of cases that will be wrongfully decided under the Ninth Circuit standard (and in conflict with other Circuits) will increase. Companies with nationwide operations will be especially vulnerable – particularly given that the federal securities laws allow for nationwide service of process. The Court should act to resolve this conflict and avoid the economic disruption that inevitably will be caused by the lack of consistency in the loss causation pleading requirement.

B. The Ninth Circuit's Ruling Misapplied The *Twombly* Standard Of Pleading.

The Ninth Circuit's analysis of pleading standards rests heavily on this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a widely-cited opinion that clarified what must be pled for a complaint to pass muster under Rule 8(a). The Ninth Circuit misapplied *Twombly*, however, which when read properly actually rebuts the assertion that respondents had pled sufficient facts to support their loss causation claims.

As an initial matter, *Twombly* expressly noted that the pleading standards it articulated were only applicable to actions applying Rule 8(a), and did not address the requirements of Rule 9(b) or any other "'heightened' pleading standard." *Twombly*, 550 U.S. at 570, n.14. Thus, reliance on *Twombly* is appropriate only if it is determined that Rule 8(a) is the applicable pleading standard. No such determination was made here, and indeed, the Ninth Circuit expressly chose *not* to rule on whether Rule 8(a) or Rule 9(b) applied to the pleading of loss causation. Thus, to the extent that one concludes, as the Fifth and Seventh Circuits have, that Rule 9(b) governs, the entirety of the Ninth Circuit's *Twombly*-based analysis is rendered inapposite.

Moreover, even if one does assume that Rule 8(a) governs pleading of loss causation, the Ninth Circuit's holding is still inconsistent with *Twombly*, which requires the pleading of sufficient "facts to state a claim to relief that is *plausible on its face*." *Twombly*, 550 U.S. at 570 (emphasis added). The Ninth Circuit's formulation – that a loss causation theory cannot be "per se implausible" – bears superficial resemblance to *Twombly*, but is in fact an impermissible relaxing of the governing standard. A "per se implausible" requirement by definition does not exclude "moderately implausible" or even "highly implausible" loss causation theories, neither of which is acceptable under *Twombly*, which requires pleading of theories that are *plausible*. *Id.*

Put another way, the Ninth Circuit's "per se implausible" test is the functional equivalent of the oft-cited pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which only permitted dismissal if it was "beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Twombly*, however, notably disavowed the *Conley* standard, because it would allow "a wholly conclusory statement of claim [to] survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 560. The same holds true for the Ninth Circuit's standard of loss causation pleading, which should be similarly discarded and brought in line with the rulings of the other Circuits.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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